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No. 90-1523

In The

Supreme Court of the United States

October Term, 1990

AMERICAN BOOKSELLERS ASSOCIATION, INC.,

Petitioners,

v.

JAMES WEBB, etc. et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

MICHAEL J. BOWERS
Attorney General of Georgia

DARYL A. ROBINSON
Senior Assistant Attorney General of Georgia

WILLIAM F. AMIDEO
Assistant Attorney General of Georgia

GEORGE M. WEAVER
Special Assistant Attorney General of Georgia
Counsel of Record
9040 Roswell Road
Suite 410, River Ridge
Atlanta, Georgia 30350
(404) 641-6010

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that the provision of the Georgia minors' access law, which has never been enforced or construed by the Georgia courts, that prohibits the "knowing[]" display in public of material obscene for minors and having no serious value for any reasonable minor does not have a substantial deterrent effect on protected expression, is subject to narrowing constructions, and is therefore not subject to facial overbreadth invalidation.

2. Whether the Court of Appeals erred in concluding that the library exemption of the Georgia minors' access obscenity law, which has never been enforced or construed by the Georgia courts, is not violative of the Equal Protection Clause of the Fourteenth Amendment.

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STATEMENT OF THE CASE

The Georgia minors' access law, which is found at 1984 Georgia Laws 1495, Ga. Code Ann. §§ 16-12-102, *et seq.* ("the Act"), became effective on July 1, 1984. The Act is a modest attempt to in some way restrict the exposure to minors of materials harmful to them. An example of such materials is Defendants' Exhibit 1, which was described by the Eleventh Circuit as follows:

> Defendant's Exhibit 1, *Human Digest* (June 1984), found in a convenience store with no restriction on in-store access by minors, would be "harmful to minors" and thus subject to section 16-12-103's ban on sales to minors and display. The cover refers to several articles within that are written from the juvenile perspective: " 'Why My Mom Loves Oral Sex!' "; " 'I Made X-Rated Videos for Dad!' "; " 'Sex Slave Sis!' "; and " 'My Anal Aunt!' ".

919 F.2d at 1505 n.22.

A number of municipalities and almost all states have minors' access laws.[1] American Booksellers

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[1] *See* Amici Curiae Brief of the State of Georgia, et al., Appendix, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), which cites statutes of 48 states regulating the display or exhibition of materials harmful to minors. In their brief, Georgia and 19 other states urged the Court to note probable jurisdiction of a Fourth Circuit decision striking the Virginia minors' access statute. *American Booksellers Ass'n v. Virginia*, 792 F.2d 1261 (4th Cir. 1986), *vacated* 488 U.S. 905 (1988). Inasmuch as the Fourth Circuit has now reversed itself, *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), and all other recent circuit decisions have upheld minors' access laws, there is no present reason for Supreme Court intervention.

Association and its kindred plaintiffs have for several years doggedly pursued an unsuccessful national campaign against such laws. *See, e.g., American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989) (upholding Virginia minors' access statute); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. Super. 1984) (upholding Pennsylvania minors' access statute). Attacks by other plaintiffs on minors' access laws have also been largely unsuccessful. *See, e.g., Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (upholding Minneapolis minors' access ordinance); *M.S. News v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (upholding Wichita minors' access ordinance).

Unlike plaintiffs' statement in their petition, they did not at the trial of this action present "extensive uncontradicted" or "substantial evidence to support their constitutional challenges." (Petition at 9, 12). Nor are plaintiffs correct in saying that defendants "presented no evidence in the trial court controverting the material evidence submitted by plaintiffs." (*Id.*) Plaintiffs' witnesses offered no support to their case. For example, Norma Klein and Patrick Conroy testified that, even based on their flawed understanding that the Act permitted regulation on the basis of isolated excerpts, they did not believe their works to be subject to the Act. (R. IV at 113-14, 153, 155). Moreover, Bobbie West Alford, who showed no understanding of the Act, testified that she did not believe that the work about which she expressed concern, "Cat on a Hot Tin Roof," would be subject to regulation. (*Id.* at 97-98). Instead of supporting plaintiffs' position, the testimony of these witnesses actually shows that the Act would not have any effect on speech materials.

At trial, defendants submitted evidence showing that the Act places a very small burden on affected establishments. Rayford Collins, a Fulton County, Georgia, law enforcement officer, testified that the sample of plaintiffs' establishments he visited before the effective date of the Act were already in compliance. (R. V at 19-30). Janice Horton, a Georgia State Senator, testified regarding a display of sexually explicit materials at a convenience store in McDonough, Georgia. She testified that Defendants' Exhibit 1, which is mentioned above, along with two other sexually explicit exhibits (Defendants' Exhibits 2 and 3) were openly displayed with no restrictive signs and within reach of children. (R. IV at 75-76).

Plaintiffs have in their petition described the journey of this case through the lower federal courts and Georgia Supreme Court. After a period of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the district court declared the display provision and library exemption of the Act unconstitutional. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986).[2] As summarized by the Eleventh Circuit, the

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[2] During abstention, the Georgia Supreme Court resolved adversely to plaintiffs a state constitutional issue they had raised. 254 Ga. 399 (responding to certified questions). The Georgia court also declined an open-ended request "to construe the provisions in Act 1319, 1984 Ga. Laws 1495, which have been challenged in this suit." *Id.* at 401. Due to the anticipatory nature of the challenge and the absence of enforcement facts, the court found "it to be inappropriate to establish the parameters within which the Act may or may not be operative." *Id.* Plaintiffs' repeated misrepresentations to this Court that the Georgia Supreme Court refused to construe the statute narrowly ill serve their credibility. (Petition at 8, 13).

district court "interpreted the statute to 'reduce an adult's selection of reading materials to a book list suitable for a fifth grade class.' " 919 F.2d at 1495. The district court concluded that this drastic and unacceptable effect would occur because: the Act covers " 'the predominate amount of all of the adult reading material' "; the application of the "harmful to minors" provision is determined by the maturity of "most minors" including those 10 years old; in order to comply with the Act a bookseller would be required to perform the impossible task of reviewing "his entire inventory"; and there are no readily available narrowing constructions. 643 F. Supp. at 1549-55. Presaging future developments, the district court conceded, however, that if the Act applied "only to material on the fringe of protected expression," *id.* at 1554, or "to materials inappropriate for minors approaching the age of majority," it might well be constitutional. *Id.* at 1556. *See also* 919 F.2d at 1498 (noting district court's concessions). In a later order, the district court found the library exemption not to be severable and struck the entire statute. *American Booksellers Ass'n v. Webb*, 654 F. Supp. 503 (N.D. Ga. 1987).

On December 27, 1990, the Court of Appeals for the Eleventh Circuit reversed the judgment of the district court. Exercising independent appellate review,[3] the court held that under *Pope v. Illinois*, 481 U.S. 497 (1987), a decision unavailable to the district court and which probably would have altered the district court's conclusions, there was a "dramatic[] decrease[] [in] the amount of

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[3] The parties agreed that the Eleventh Circuit should use independent appellate review. 919 F.2d at 1498, 1498 n.10.

material actually covered by the ban on display and [in] the indirect burden suffered by adults as a result." 919 F.2d at 1505. Moreover, the court of appeals concluded that readily available narrowing constructions further reduced any burden on adult speech. 919 F.2d at 1508-09. The Eleventh Circuit also disagreed with the district court's conclusion that the Act's exemption of public libraries is subject to strict scrutiny and therefore violative of the Equal Protection Clause. The court of appeals summarized all of its holdings:

> We find the statute is readily susceptible to a narrowing construction that reduces the scope of materials covered, produces only a slight burden on adults' access to protected material, and fully comports with the First Amendment. We also reverse the district court's determination that an exemption granted in the statute to libraries is subject to strict scrutiny and violates the Equal Protection Clause.

919 F.2d at 1495.

SUMMARY OF ARGUMENT

This case presents a facial attack on the constitutionality of the Georgia minors' access obscenity statute. Plaintiffs have challenged the statute prior to its construction or enforcement by Georgia courts. The statute is designed to discourage premature exposure of minors to materials harmful to them.

This statute is supported by two strong state interests. First, the states have a " 'compelling' " interest in " 'safeguarding the physical and psychological well-being

of a minor.' " *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (cit. omitted). Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). These state interests support laws limiting not just the sale but also the display to minors of material harmful to them.

Facial overbreadth challenges are disfavored. The successful maintenance of such a challenge requires demonstration that: (1) the statute "is not readily subject to a narrowing construction by the state courts," and (2) the statute's "deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The Eleventh Circuit correctly held that plaintiffs failed to meet the test for facial overbreadth invalidation. As other circuits and lower courts have held in review of similar laws, the court of appeals held that the Act places only a "slight burden on adults' access to protected material." 919 F.2d at 1495. The court reached this conclusion by applying *Pope v. Illinois*, 481 U.S. 497 (1987), which was not available to the district court, to the *Ginsberg*-derived definition of "harmful to minors." The court recognized that *Pope* does not permit regulation of material as long as "any reasonable minor, including a seventeen-year-old, would find serious value." 919 F.2d at 1504-05. The Eleventh Circuit also held that the scienter requirement, which punishes only "knowing[]" displays, and the ready availability of a construction permitting compliance by use of "blinder racks" "dramatically decreases the

amount of material actually covered by the ban on display and the indirect burden suffered by adults as a result." 919 F.2d at 1506.

The Eleventh Circuit also correctly upheld the library exemption against plaintiffs' equal protection attack. Consistently with other circuits, the court of appeals employed the rational basis test. 919 F.2d at 1509-10. The court correctly recognized that the exemption to this obscenity statute for libraries is rationally related to the states' legitimate interest in controlling the commercial distribution and display of obscene materials and the states' legitimate interest in protecting educational uses of explicit materials. 919 F.2d at 1511-13.

Therefore, the decision of the Eleventh Circuit is correct and plaintiffs' petition should be denied.

ARGUMENT

I. THE GEORGIA ACT IS SUPPORTED BY THE STATES' STRONG INTERESTS IN PROTECTING MINORS FROM ACCESS TO MATERIALS HARMFUL TO THEM AND IN PROTECTING THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN.

Minors' access laws are supported by two weighty state interests. First is the compelling state interest in protecting minors from obscene materials. Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children.

This Court has repeatedly affirmed that states have a strong interest in protecting the welfare of minors. In *New*

York v. Ferber, 458 U.S. 747 (1982), the Court concluded: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is *'compelling.'* " *Id.* at 756-57 (cit. omitted) (emphasis added). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court acknowledged " 'society's *transcendent* interest in protecting the welfare of children.' " 390 U.S. at 640 (cit. omitted) (emphasis added). The Court made it clear that this interest is "independent" from parents' interests in their children. *Id.* at 639-40.

In addition to the states' compelling interest in the welfare of minors, states have a substantial interest in protecting the rights of parents to supervise the development of their children. In *Ginsberg*, the Court recognized that parents' right "to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639. The Court went on to hold that the minors' access law in question there was supported by this interest. *Id. See also Bolger v. Youngs Drug Products*, 463 U.S. 60, 73 (1983) (describing the governmental interest in "aiding parents' efforts to discuss birth control with their children" as *"substantial"*) (emphasis added).

In *Ginsberg*, the Court affirmed a conviction under a New York statute for the sale to a 16-year-old boy of two " 'girlie' " magazines which were "harmful to minors" as defined by the statute. 390 U.S. at 631-33. This result was reached even though the magazines were "not obscene for adults." *Id.* at 634. The Court distinguished the New York statute in question there from the Michigan statute struck down in *Butler v. Michigan*, 352 U.S. 380 (1957), which forbade the distribution to adults of materials

believed to have an adverse effect on minors. 390 U.S. at 634-35.

The states' interests in the protection of minors from sexually explicit materials and preserving the rights of parents as recognized and upheld in *Ginsberg* extend beyond the sale to minors of objectionable materials and include the display of such material in public places. The Court characterized the New York statute, which it upheld, as denying minors *"access"* to harmful material, 390 U.S. at 636 (emphasis added), restricting their right "to judge and determine for themselves what sex material they may read and see," *id.* at 636-37, a regulation of "the *availability* of sex material to minors," *id.* at 639 (emphasis added), and a restraint on "minors' *exposure* to such material." *Id.* (emphasis added). *See also id.* at 641.

Since *Ginsberg*, the Court has repeated the view that the states' legitimate interests extend to all exposure to minors of materials obscene for them. In *FCC v. Pacific Foundation*, 438 U.S. 726 (1978) (plurality opinion), the Court summarized *Ginsberg* as holding that "[b]ookstores and motion picture theatres, for example, may be prohibited from making indecent material *available* to children." *Id.* at 749 (emphasis added). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their *access* to, material objectionable as to them") (emphasis added); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); *Miller v. California*, 413 U.S. 15, 18-19 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1957).

It is thus clear that the states' legitimate interests in protecting minors from harmful materials extend to all means of public access including display. Obviously, the Georgia Act would not fully express these interests if it forbade only the sale to minors of harmful materials but allowed other forms of dissemination such as display.

II. THIS COURT HAS IMPOSED STRICT LIMITATIONS ON THE FACIAL INVALIDATION OF STATE STATUTES FOR OVERBREADTH.

An overbroad statute is one that sweeps protected First Amendment activity into its scope. This Court has often made clear that the normal procedure for handling a threat by a state or federal statute to constitutionally protected activity is invalidation of the particular application – not striking the statute on its face. For example, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court reversed a conviction under the Georgia adult obscenity statute for exhibiting the movie "Carnal Knowledge," but did not facially invalidate the statute. *See also Brockett v. Spokane Arcades*, 472 U.S. 491, 502-05 (1985) (citing cases); *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973) (citing cases).

In order to limit use of the doctrine to serious threats to First Amendment values, this Court has issued a number of restrictions. It has frequently warned that facial invalidation for overbreadth is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Defendants submit that

courts should be especially scrupulous in their observation of the limitations on facial invalidation for overbreadth when, as in the case before this Court, the challenge is made prior to enforcement. In these cases, the states or other authorities have had no opportunity to eliminate by enforcement or construction any potential unconstitutional applications.

In circumscribing use of the facial overbreadth doctrine, this Court has ruled that the existence of valid applications will normally save a statute from facial invalidation. *See, e.g., Parker v. Levy*, 417 U.S. 733, 760 (1974) (describing the Court's "reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"); *Ferber*, 458 U.S. at 773 (upholding child pornography statute "whose legitimate reach dwarfs its arguably impermissible applications"). Thus, the possibility of one or several unconstitutional applications is not sufficient to invalidate a statute. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"). Every statute is probably susceptible to some unconstitutional application. This Court has said:

> "Without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application."

New York v. Ferber, 485 U.S. at 772 n.27 (cit. omitted). *See also Broadrick*, 413 U.S. at 618 (statute upheld although it

"may be susceptible of some other improper applications"). Expressing the same principle, the Court has also suggested that potential unconstitutional applications of a state statute are not a basis for invalidation so long as the statute reaches a "central core of constitutionally regulable conduct." *Ferber*, 458 U.S. at 771 n.26. *See also Broadrick*, 413 U.S. at 615-18.

This Court has imposed two basic requirements for facial overbreadth invalidation. In *Erznoznik*, the Court held: "[A] state statute should not be deemed facially invalid unless [1] it is not readily subject to a narrowing construction by the state courts, and [2] its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216 (cits. omitted). Note that the elements are conjunctive: both must be present in order for a state statute to be facially invalidated. *Id.* at 217. The Eleventh Circuit quoted and followed this Court's admonition that, when considering narrowing constructions, " '[t]he key to application of this principle is that the statute must be "readily susceptible" to limitation.' " 919 F.2d at 1500 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)).

The requirement of "substantial" overbreadth applies with particular force " 'where conduct and not merely speech is involved.' " *Broadrick*, 413 U.S. at 615, (quoted in Ferber, 458 U.S. at 770). As the Eleventh Circuit concluded minors' display laws regulate " 'conduct plus speech' " and substantial overbreadth must therefore be shown for invalidation. 919 F.2d at 1500; *accord M.S. News*, 721 F.2d at 1289.

One corollary of the above-mentioned prerequisites to facial overbreadth invalidation is that the presence of an earlier state court decision narrowing the scope of a statute is not essential to its withstanding constitutional challenge. *See Frisby v. Schultz*, 487 U.S. 474, 481-83 (1988) (construing and upholding language of municipal picketing ordinance previously unconstrued by state courts); *Cole v. Richardson*, 405 U.S. 676 (1972) (construing previously unconstrued language of a Massachusetts loyalty oath statute in a manner so as to uphold it); *Rose v. Locke*, 423 U.S. 48, 51-52 (1975) (holding that previous applications of a statue are not "a prerequisite to a statute's withstanding constitutional attack"); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1966) (refusing to invalidate on its face a New York privacy statute and stating that the Court "confidently expect[ed] that the New York courts [would] apply the statute consistently with the constitutional command"); *IDK, Inc. v. County of Clark*, 836 F.2d 1185, 1191 (9th Cir. 1988) ("If the courts of a state could adopt a construction of its statute that eliminates the constitutional defects, federal courts should defer.")

The Eleventh Circuit found "no relevant distinction" in the test for facial overbreadth invalidation and "the constitutional standards applicable to a time, place, and manner restriction." 919 F.2d at 1502. The court concluded:

> In evaluating the display ban under either test, the crucial inquiry, at least in this case, is whether the restriction on adults' access to protected speech is unnecessarily burdensome or "significant," or, stated differently, whether alternative modes of adult access are unduly restricted.

Id.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, FOR REASONS EITHER UNAVAILABLE TO OR NOT RECOGNIZED BY THE DISTRICT COURT, THE ACT PLACES ONLY A MINOR BURDEN ON PROTECTED ADULT SPEECH.

The Eleventh Circuit correctly held that the Act places only a minor burden on protected adult speech. The court of appeals found the "slight burden on adults' access to protected material" to be "far less than the district court suggests." 919 F.2d at 1495, 1506. Similar conclusions have been reached by other courts reviewing minors' access laws. For example, in *M.S. News*, the Tenth Circuit concluded that "the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them." *Id.* at 1288. In support of its conclusion, the court pointed out: "[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *Id.* at 1289. And in *Upper Midwest*, the Eighth Circuit held that the Minneapolis display ordinance which it sustained did not substantially interfere with adult free speech:

> We believe that the ordinance in the instant case is one that is "carefully limited," *Miller*, 413 U.S. at 24, and that does not unduly burden the First Amendment rights of adults. *See Butler*, 352 U.S. at 383; *cf. Erznoznik*, 422 U.S. at 213. Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in adults only bookstores or in segregated sections

> of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

Id. at 1395. *See also American Booksellers Ass'n v. Rendell,* 481 A.2d at 941 ("although adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not significantly be impaired" and "any inhibitory effect on dissemination to adults does not render the display provision [of the Pennsylvania minors' access law] constitutionally defective, given the state's legitimate interest in shielding children from these materials").

This Court has also recognized on several occasions that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. *See Bethel School District v. Fraser,* 478 U.S. 675, 684 (1986) ("This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children"); *FCC v. Pacifica Foundation,* 438 U.S. 726, 729 (1978) (plurality opinion) (upholding the power of the FCC to regulate for the protection of children a radio broadcast which was "indecent but not obscene").

In a straightforward application of *Pope v. Illinois,* 481 U.S. 497 (1987), the Eleventh Circuit held that under the Act material could not be found obscene for minors as

long as "any reasonable minor, including a seventeen-year-old, would find serious value." 919 F.2d at 1504-05. Of course, *Pope* was not available to the district court when it declared the Georgia Act unconstitutional for overbreadth. In concluding that "Georgia courts would interpret section 16-12-102 in light of *Pope*," the court of appeals cited *Hunter v. State*, 257 Ga. 571 (1987), in which the Georgia Supreme Court recognized *Pope* to be applicable to the Georgia Act. 919 F.2d at 1504. The Eleventh Circuit also followed the Fourth Circuit and Virginia Supreme Court in their understanding of the effect of *Pope*. 919 F.2d at 1504-05 (citing *American Booksellers Ass'n v. Virginia*, 882 F.2d at 127 (quoting *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618, 624 (1988))).

Petitioners suggest that the failure of the Georgia Supreme Court to answer a certified question seeking construction of the display provision of the Georgia Act distinguishes this case from the Virginia case and dictates that the Georgia statute be stricken as unconstitutional. For a number of reasons, petitioners' argument is invalid. Most obviously, *Pope* was not available at the time the Georgia Supreme Court was requested to construe the Act. Moreover, the Georgia Supreme Court was not asked any specific questions about the meaning of the Georgia statute but rather simply how it "construe[d] the provisions in Act 1319, 1984 Ga. Laws 1495, which have been challenged." 744 F.2d at 786. This question is far different from the specific constructions requested of the Virginia Supreme Court. As the Eleventh Circuit pointed out, the Georgia Supreme Court simply expressed its reluctance to construe the statute "in the absence of enforcement

facts, finding instead that the challenge was anticipatory." 919 F.2d at 1497. But most importantly the effect of *Pope* on the *Ginsberg*-derived definition of minors obscenity as repeated in the Georgia Act, Virginia statute, and all other minors' access laws, is not a matter of state statutory construction but rather federal constitutional law. And, as discussed above, the absence of earlier state court decisions narrowing the scope of a state statute is not fatal to constitutionality, particularly where as here the statute does not have a significant effect on protected adult speech.

As the Eleventh Circuit concluded, the burden on adult speech is also "far less than the district court suggests" when one gives full effect to the requirement of the Act that displays be made "knowingly," § 16-12-102(2), -103, before they are subject to regulation. 919 F.2d at 1506. The district court had erroneously concluded that in order to comply with the Act a bookseller would be required to review "his entire inventory" and in effect pre-screen all new purchases. 643 F.Supp. at 1553. The Eleventh Circuit properly concluded that the district court's confusion on this issue led it to overestimate the effect of the Act on adult speech. 919 F.2d at 1506. As this Court has explained, it is a statute without a knowledge or scienter element that requires a bookseller "to make himself aware of the contents of every book in his shop." *Smith v. California*, 361 U.S. 147, 153-54 (1959) (striking a Los Angeles obscenity ordinance containing no scienter element and thus imposing strict liability).[4]

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[4] Although the prosecution need not prove knowledge that materials are obscene, this Court has consistently held that

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Defendants maintain that in view of the minimal burden on adult speech as is evident from the application of *Pope* and the Act's scienter requirement, the consideration of narrowing constructions is unnecessary. In *Erznoznik*, this Court held that, regardless of the ready availability of narrowing constructions, a state statute may not be invalidated for facial overbreadth unless "its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216.

Assuming, however, the necessity of considering narrowing constructions of the Georgia Act, it is manifest that the Eleventh Circuit properly recognized the use of blinder racks to be a nonburdensome manner of compliance. Although more onerous methods of compliance can be imagined, just as hypothetical unconstitutional applications of any statute can be imagined, the court concluded that "blinder racks do not 'exhibit, expose, or display in public' material subject to section 16-12-103(e)." 919 F.2d at 1508. In reaching this result, the court applied the ordinary meanings of the words of the Act. The court of appeals further concluded:

> Therefore, under our reading of section 16-12-103(e), it is not necessary that booksellers physically segregate material placed behind

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no one may be convicted of an obscenity offense unless he is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. 87, 123 (1974). Just as in all other states, obscenity statutes in Georgia are applied consistently with this constitutional requirement. *See Sewell v. State*, 238 Ga. 495, 496 (1977), *app. dism.*, 435 U.S. 982 (1978), *citing Hamling*, 418 U.S. 87.

> blinder racks from material accessible to minors. Since the statute is "readily susceptible" to such a reading, we need not consider broader interpretations of the requirements for compliance with section 16-12-103(e). *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. at 397-99, 108 S. Ct. at 645 (1988). Placing the relatively small amount of reading materials subject to section 16-12-103 behind blinder racks only slightly burdens adults' access to such material. Blinder racks do not impose a "substantially overbroad" regulation on "conduct plus speech." (See the discussion above at pp. 1499-1500, 1502). Adults may peruse and purchase the material without restriction. Under either the balancing test for regulations on material protected to one group but not another, or the test for the constitutionality of a time, place, and manner regulation, (see the discussion above p. 1502), the burden on adults' access to material protected as to them is constitutionally insignificant and therefore permissible. *See M.S. News*, 721 F.2d at 1288-89 (relying in part on blinder racks exception to uphold statute against facial challenge).

919 F.2d at 1508-09. Plaintiffs have argued that recognition of a readily available construction under which the use of blinder racks avoids a "display in public" constitutes rewriting the Act. This argument is obviously fallacious.

The Eleventh Circuit decision this Court is asked to review is fully consistent with all other pertinent circuit decisions. The Fourth, Eighth, and Tenth Circuits have upheld minors' access laws against facial overbreadth challenges. *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989); *Upper Midwest Booksellers Ass'n v.*

Minneapolis, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983).

The dissent below by District Judge Pointer to the majority's view of the overbreadth issue was based on a misunderstanding of the Act. Although District Judge Pointer agreed "we should assume that Georgia would adopt a narrow construction of the section," he concluded that the Act would have a broader affect on adult speech than the majority found because, according to Judge Pointer, the Act regulates matter that "contains" explicit material. 919 F.2d at 1515. Judge Pointer apparently failed to understand that the Act, although some of its provisions overlap, only regulates material that "taken as a whole" satisfies the prurience and lack of serious value elements. Ga. Code Ann. § 16-12-102(1)(A), (C). It is significant that even the district court recognized that no material is subject to regulation under the Act unless "taken as a whole" it satisfies the definition of "harmful to minors." 590 F.Supp. at 688. Evidently realizing Judge Pointer's misunderstanding of this aspect of the Act, petitioners do not suggest to this Court that Judge Pointer's analysis of the overbreadth issue should prevail.

Plaintiffs do, however, make a curious argument against the constitutionality of the display provision of the Act. They propose that the "harmful to minors" definition in the Act be interpreted to regulate "material deemed 'harmful' to *any* minor." (Petition at 19) (emphasis in original). Plaintiffs thus propose that the Act be construed to regulate material which, meeting the other prongs of the obscenity test, also lacks serious value

for a five year old child. If the Act required this construction, defendants would concede its unconstitutionality. As the Eleventh Circuit recognized, however, the Act does not require such a contrived construction. In effect, plaintiffs argue that the Act should be construed in isolation from *Pope*, without regard to the Act's scienter requirement, and without recognition of obvious narrowing constructions, in order that it may be held unconstitutional. (Petition at 15). Although ambivalent on the point, plaintiffs complain to this Court that under the Eleventh Circuit decision the Act is "a duplicative and meaningless statute which encompasses little or nothing more than that covered by Georgia's general obscenity laws." (Petition at 17). Of course, the states are not forbidden by the Constitution from enacting laws having no significant effect on private conduct. And plaintiffs' "open season" view that state laws should be broadly construed for the purpose of striking them is in derogation of all precedent and reason.

IV. THE COURT OF APPEALS DID NOT ERR IN UPHOLDING THE LIBRARY EXEMPTION UNDER THE RATIONAL BASIS TEST OF EQUAL PROTECTION.

The Act contains in § 16-12-104 an exemption for public and school libraries. The Eleventh Circuit correctly held that this legislative classification is not subject to strict scrutiny under the Equal Protection Clause. 919 F.2d at 1509. The court then correctly held that the library exemption does not violate the Equal Protection Clause because it is rationally related to the states' legitimate interest in controlling the commercial distribution and

display to minors of obscene materials and the states' legitimate interest in protecting educational uses of explicit materials. 919 F.2d at 1511-13.[5] *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (recognizing "legitimate state interests at stake in stemming the tide of commercialized obscenity").

In a 1988 decision, this Court emphasized the difficulty of a successful equal protection challenge to a legislative classification. In *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2236 (1988), the Court held:

> Legislative classifications, however, are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute: "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [cit. omitted] In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. [cit. omitted]

Id. at 2236 (emphasis in original).

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[5] The Eleventh Circuit also noted a Seventh Circuit suggestion that library exemptions to obscenity statutes may "serve the purpose of shielding libraries from groundless complaints that they are disseminating obscene materials." 919 F.2d at 1511 n.38 (citing *Kucharek v. Hanaway*, 902 F.2d 513 (7th Cir. 1990)).

It is important to understand that almost all obscenity statutes contain exemptions, defenses, or presumption exceptions applying to various classes of persons, institutions, organizations, and categories of activities. Such measures are found in adult obscenity statutes, minors' access laws, child pornography statutes, and other obscenity regulations. A number of states provide exemptions or defenses for such educational uses as represented by libraries, schools, and universities. Although libraries are probably included in all educational exemptions and defenses, obscenity statutes of 32 states recognize specific exemptions for libraries.[6] If strict scrutiny is to be applied to all of these

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[6] Ark. Stat. Ann. § 5-68-308(c) (1987); Colo. Rev. Stat. § 18-7-503(1)(a) (1990); Del. Code Ann. tit. 11, § 1365(k)(3) (1987); Ga. Code Ann. § 16-12-104 (1988); Idaho Code §§ 18-1517(1)(d), -4102(B) (1987); Ill. Rev. Stat. ch. 38, §§ 11-20.1(b)(2), 11-21(e)(1) (1979 & Supp. 1990); Ind. Code Ann. § 35-49-3-4(2) (Burns 1985); Iowa Code Ann. § 728.7 (1979); Kan. Stat. Ann. §§ 21-4301(4)(b), -4301a(2)(b), -4301a(2)(c), -4301a(2)(d) (1988); La. Rev. Stat. Ann. § 14:106(D)(1) (West 1986); Me. Rev. Stat. Ann. tit. 17, § 2911(2)(A) (1983 & Supp. 1990); Mass. Ann. Laws ch. 272, §§ 28, 28C, 29B(e) (Law Co-op. 1980 & Supp. 1991); Mich. Comp. Laws Ann. §§ 752.367(a)(ii), 722.676(d) (1991 & Supp. 1990); Minn. Stat. Ann. § 617.295(a) (West 1987); Miss. Code Ann. § 97-29-107(1)(c) (Supp. 1990); Neb. Rev. Stat. §§ 28-810(4), -815(1) (1989); Nev. Rev. Stat. Ann. § 201.237 (1986); N.H. Rev. Stat. Ann. § 649-A:4 (1986); N.M. Stat. Ann. § 30-37-5.D (1989); N.Y. Penal Law §§ 235.10, 263.20(2) (McKinney 1989); N.C. Gen. Stat. §§ 14-190.15(c) (2) (1986); N.C. Gen. Stat. § 19-20(b)(3) (1983); N.D. Cent. Code §§ 12.1-27.1-03.1(2)(c), -27.1-11, -27.2-05(2) (1985 & Supp. 1989);

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statutes, the courts have much work to do. As everyone knows, strict scrutiny is "strict in theory and fatal in fact."

In applying the rational basis test of equal protection to the library exemption, the Eleventh Circuit followed the overwhelming preponderance of authority. If this case involved fully protected First Amendment interests, a strict scrutiny standard would certainly be appropriate.[7] *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Except in a very few cases, strict scrutiny has not been applied in equal protection review of regulations of any category of

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Ohio Rev. Code Ann. §§ 2907.32(B), .321(B)(1), .322(B)(1), .323(A) (Anderson Supp. 1990); Or. Rev. Stat. §§ 167.085(2), .089 (1990); S.C. Code Ann. § 16-15-385(c)(2) (Law Co-op. Supp. 1990); S.D. Codified Laws Ann. §§ 22-24-31(4), -37(2) (1988); Utah Code Ann. §§ 76-10-1224, -1226 (1990 & Supp. 1990); Vt. Stat. Ann. tit. 13, § 2805(b)(3), (c)(3) (Supp. 1990); Va. Code Ann. §§ 18.2-383(1), -391.1(1) (1988); Wash. Rev. Code §§ 9.68.015, 9.68.100 (1988); Wis. Stat. Ann. § 944.21(8)(a), (b)(5) (Supp. 1990); Wyo. Stat. § 6-4-302(c)(ii)(1988).

The Model Penal Code contains an affirmative defense if "dissemination was restricted to . . . . institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material." Model Penal Code Sec. 251.4(3)(a) (Proposed Official Draft 1962). A number of the above-cited statutes also incorporate this provision.

[7] On page 23 of the petition, plaintiffs misstate that "the State itself conceded that if the display proscription affects First Amendment protections, strict scrutiny would be applicable and the exemption would be unconstitutional." Defendants never made any statement resembling this in any of the lower court briefs.

obscene materials. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Court's plurality opinion appears to apply a reasonable basis test to a zoning regulation of erotic, but non-obscene, material. *Id.* at 71-72. *See also Hart Book Stores v. Edmisten*, 612 F.2d 821, 831 n.13 (4th Cir. 1979) ("The *Mini Theatres* plurality apparently considered that classification of sexually explicit materials would invoke only minimal scrutiny, 427 U.S. at 70-73.") In *Kucharek v. Hanaway*,. 902 F.2d 513 (7th Cir. 1990), the Seventh Circuit applied the rational basis test of equal protection in upholding an exemption to a Wisconsin obscenity statute for libraries, schools, and contract printers. *Id.* at 520-21. The Ninth Circuit has reached a similar conclusion. In *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989), the Ninth Circuit applied the rational basis test and rejected an equal protection challenge to an exemption to both adult obscenity and minors' access provisions in an Arizona statute. *Id.* at 1050.

The Tenth Circuit has reached the same conclusion. In *M.S. News*, 721 F.2d 1281, that court employed the rationality test in upholding an exemption in a Wichita minors' access law for noncommercial displays or distributions. The Tenth Circuit convincingly pointed out the different incentives involved in commercial and non-commercial uses of covered materials:

> Commercial enterprises have the economic incentive to make sales and are therefore more likely to press the display and dissemination of material harmful to minors. Hence making a distinction between commercial and noncommercial enterprises is sufficiently grounded in a legitimate state interest.

Id. at 1291-92. Although the Georgia Act does not exempt as many non-commercial uses as the Wichita ordinance, the Eleventh Circuit correctly recognized that its library exemption does in fact distinguish commercial from non-commercial uses. 919 F.2d at 1511. Moreover, in *Piepenburg v. Cutler*, 649 F.2d 783 (10th Cir. 1981), the Tenth Circuit upheld an affirmative defense in a Utah obscenity statute for educational and similar uses. *Id.* at 785-87.

Numerous other lower court decisions have reached the same conclusion. *See e.g., American Booksellers Ass'n v. Rendell*, 481 A.2d 919, 942 (Pa. Super. 1984); *Long v. 130 Market St. Gift & Novelty*, 440 A.2d 517, 523-24 (Pa. Super. 1982).

Plaintiffs cite the Eighth Circuit's decision in *Upper Midwest*, 780 F.2d 1389, as creating a circuit conflict on equal protection review of exemptions to obscenity statutes. (Petition at 25 n.5). In *Upper Midwest*, the district court applied strict scrutiny in striking exemptions to a Minneapolis minors' access ordinance for libraries, schools, and several other categories of institutions and individuals. The district court held, however, that the remainder of the ordinance was constitutional and severable. The district court's use of strict scrutiny to strike the exemptions was not appealed to or reviewed by the Eighth Circuit. 780 F.2d at 1391. Noting that the exempted uses were probably already protected through the serious value prong of the obscenity test, the Eighth Circuit did review and uphold the district court's decision on severability. *Id.* at 1398-99. Thus, the Eighth Circuit's decision does not create a circuit conflict. As is evident from the above discussion, all recent circuit decisions have applied

the rational basis test in upholding exemptions and defenses similar to that presented here.

It would indeed be anomalous to strike on equal protection grounds exemptions and defenses for educational and non-commercial uses of sexually explicit material. This would result in the criminalization of more speech than the Georgia Legislature has chose to criminalize. As the Eleventh Circuit stated, "Finally, striking down such an exemption would hinder rather than promote robust speech." 919 F.2d at 1512. *See also Ripplinger*, 868 F.2d at 1050 (striking an obscenity statute exemption "would not serve the first amendment policy of encouraging and furthering free expression"); *Kucharek*, 902 F.2d at 520 (noting the curiosity of challenging an exemption on the ground of its "leniency").

CONCLUSION

For the above-stated reasons, the Court should deny plaintiffs' petition. As concluded by the Eleventh Circuit, the Georgia minors' access law, when understood in light of this Court's decision in *Pope*, the scienter provision, and readily available narrowing constructions, has only an incidental and minimal effect on protected adult speech. This effect is not substantial and not a basis for facial overbreadth invalidation. As the Fourth, Eighth, Tenth and now Eleventh Circuits have recognized, minors' access laws at most work a slight inconvenience to a limited amount of adult speech while preserving ultimate access by adults. Moreover the decision by the

Georgia legislature to protect public libraries from obscenity prosecutions is eminently rational and not in conflict with the Equal Protection Clause. This conclusion by the Eleventh Circuit is also consistent with all pertinent decisions of other circuits.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General of Georgia

GEORGE M. WEAVER
Special Assistant Attorney
General of Georgia
Counsel of Record